



**In The
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1726

**JAMES H. SOUTHARD and CLASSIC
CAR INVESTMENTS, INC.,**

Petitioners,

vs.

FORBES, INC.,

Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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Respondent, Forbes, Inc., submits this brief in opposition to the petition of James H. Southard and Classic Car Investments, Inc., for the Writ of Certiorari, and, for the reasons set forth herein, respectfully urges the Court to deny the Writ.

I. PRELIMINARY STATEMENT

In accordance with Rule 40(3) of the Supreme Court Rules, Respondent accepts the preliminary portions of the petition (pp. 1-4) with the following exceptions:

(1) Respondent notes that the petition omits any reference to the basis for the lower courts' jurisdiction in this action, as required by Rule 23(1)(g). Jurisdiction was predicated upon diversity of citizenship pursuant to 28 U.S.C. § 1332, and the claim based upon the defamation laws of the State of Georgia. Although federal questions, specifically defenses under the First Amendment to the United States Constitution, were raised by Respondent, Petitioners' claims are not based upon any right recognized by federal law, and the constitutional defenses of Respondent were never addressed by either the District Court or the Court of Appeals.¹

(2) Respondent further submits that portions of Petitioners' "Statement of the Case" (pp. 3-4) are argumentative in their description of the subject article and the Circuit Court's decision. Instead of challenging these argumentative statements directly, Respondent respectfully calls the Court's attention to the article and decision themselves, which are reproduced in Appendices E and B, respectively, to the petition.

1. "Inasmuch as the court has found no defamatory meaning in the complained of provisions, there is no need to consider whether the plaintiffs or either of them is a public figure within the meaning of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or whether any error made in the article was the result of negligence or actual malice." District Court Order, at page 19a of Petitioners' Appendix. See also Circuit Court Opinion, note 9, at pages 7a-8a of Petitioners' Appendix.

II. ARGUMENT AND CITATION OF AUTHORITY

For the following reasons, Respondent respectfully submits that the Writ should be denied:

A. The Decisions Below Are Not in Conflict with State Law

Contrary to Petitioners' suggestion (Petition, pp. 5-7), neither the District Court's nor the Circuit Court's decision conflicts, in any way, with the applicable laws of the State of Georgia. The decisions of the Georgia courts, cited by Petitioners and relied upon by them as controlling authority, are in complete accord with the result in this action. Indeed, the Court of Appeals relied upon those very same decisions in reaching its result.²

It is well settled in Georgia that the question of libel by innuendo is submitted to the jury only where the publication is ambiguous, where it is reasonably capable of two interpretations, and where one of those interpretations is defamatory. *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973) (applying Georgia law), *cert. denied*, 415 U.S. 985 (1974); *Central of Georgia Railway Co. v. Sheftall*, 118 Ga. 865, 45 S.E. 687 (1903); *Holmes v. Clisby*, 118 Ga. 820, 45 S.E. 684 (1903). The rule in Georgia is in complete harmony with the generally accepted principle that it is for the court to determine whether a publication bears a defamatory meaning; if it does not, there is nothing for a jury to decide. See RESTATEMENT (SECOND) OF TORTS § 614.

2. See Circuit Court Opinion at pages 5a and 7a of Petitioners' Appendix.

The courts below did not conclude that a defamation plaintiff is not entitled to a jury determination of whether an ambiguous publication is libelous, but merely that the publication here in question is unambiguous. Therefore, the question of whether the unambiguous statement is defamatory or non-defamatory is for the court. That the result in this case may differ from conclusions reached in other Georgia decisions is attributable not to the application of different legal principles but to the application of the same principles to different publications.

B. The Decisions Below Are Not Inconsistent with This Court's Prior Decisions

Petitioners next contend that the lower courts' decisions are inconsistent with this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Petition, pp. 7-9. Respondent respectfully submits that this contention is untenable for two reasons.

First, the *Gertz* case dealt specifically with the question of whether the defendant was entitled to the constitutional protection recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), where the plaintiff was a private individual and not a public figure in the context of the alleged libel. In the present case, the District Court expressly declined to consider, and the Court of Appeals did not determine, whether Petitioners are public figures or whether the subject article is entitled to constitutional protection.³ Accordingly, it is inconceivable that the result here could be inconsistent with this Court's holding in *Gertz*.

Second, as Petitioners correctly note, the *Gertz* decision involved, in broader terms, the proper balance be-

3. See footnote 1, *supra* at p. 2.

tween the individual right to protection of reputation, as recognized by state law, and the freedom of the press, as guaranteed by the First Amendment. To the extent that *Gertz* might be said to swing the pendulum away from increasing protection for the press to a greater emphasis upon state defamation law, the result here is in complete accord: the courts below never considered or decided whether the subject article is entitled to First Amendment protection and decided the case, instead, on the basis of, and in complete harmony with, clearly established and long recognized principles of Georgia's law of defamation.⁴

C. The Case Does Not Involve Any Unsettled Federal Question

Petitioners further contend that the *Gertz* decision expressly reserves the question of what standards should be applied in a case of alleged libel by innuendo and urge the Court to grant the Writ to "resolve the issue left undecided". Petition, p. 9. We respectfully submit that these Petitioners, who allege libel by innuendo, are in no position to obtain relief in the resolution of this issue. If different standards are appropriate, an ambiguous publication should be afforded greater protection since it does "not warn a reasonably prudent editor or broadcaster of its defamatory potential". 418 U.S. 323, 348.

More important, the question of whether the subject article is constitutionally privileged has never been considered or decided in this case. Whether an article which is allegedly defamatory by innuendo is entitled to a different standard or degree of constitutional protection is clearly not an appropriate question for consideration at

4. See, e.g., cases cited *supra* at p. 3.

a stage of the proceedings where constitutional protection is not even in issue.⁵

D. There Are Additional Reasons for Denying the Writ

In addition to the foregoing, Respondent respectfully submits that there are additional reasons why the Writ should be denied. First, this is not a case of far-reaching implications. It deals with a particular publication and the application of well established and undisputed legal principles to that publication.

Second, both the District Court and the Court of Appeals gave complete consideration to the Petitioners' contention that they were defamed by the subject article and decided the question correctly and in full accord with controlling Georgia law. We respectfully submit that the Writ should be denied in that there is no reason why the case warrants this Court's attention or why the conclusion of the lower courts should be re-examined.

Finally, the case does not present any significant federal question, notwithstanding Petitioners' final effort to create one at this stage of the proceedings by their argument that implementation of summary judgment procedures denied them a right to jury trial guaranteed by the Seventh Amendment. Even if the argument had been raised and considered below (and it was not), it is patently untenable. The granting of summary judgment requires the finding that there is no material issue of fact and, accordingly, that there is nothing for a jury to decide. The courts below did not usurp the jury's function but found that the alleged libel was not defamatory *as a matter of law*, in accordance with well established principles of Georgia's law of libel.

5. See footnote 1, *supra*, at p. 2.

III. CONCLUSION

For these reasons, Respondent, Forbes, Inc., respectfully submits that the petition should be rejected and the Writ denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have made due and legal service of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon Petitioners by mailing three printed copies thereof to Petitioners' counsel of record,

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by depositing said copies in the United States mail properly addressed, with sufficient postage affixed thereto.

This 30th day of May, 1979.

KIRK M. McALPIN

*Lead Counsel for Respondent and
a Member of the Bar of This
Court*